STATE OF MICHIGAN

COURT OF APPEALS

ZOE SCHUITMAKER,

Plaintiff-Appellant-Cross-Appellee,

v

JANICE KRIEGER,

Defendant-Appellee-Cross-Appellant.

UNPUBLISHED
April 24, 2003

No. 233944
Berrien Circuit Court
LC No. 99-004046

Before: Murphy, P.J., and Owens and Schuette, JJ.

PER CURIAM.

Plaintiff, a licensed social worker, appeals as of right following a jury trial in this defamation action in which the jury found that a false statement had been published by defendant. The jury, however, also found that the statement was not published with actual malice; therefore, there was no liability. We affirm.

This case arises out of plaintiff's involvement as a counselor and witness in defendant's divorce proceedings in 1989-1990, plaintiff's post-divorce counseling of defendant's minor daughter and ex-husband through 1993, and a meeting between plaintiff and defendant's daughter on June 23, 1997. Plaintiff opined in the 1990 divorce trial that defendant's ex-husband should be awarded physical custody of defendant's daughter. Physical custody was awarded to defendant. The June 23, 1997, meeting between plaintiff and defendant's daughter resulted in plaintiff reporting to the Family Independence Agency (FIA) possible physical abuse committed by defendant against her daughter.[1] Defendant believed that plaintiff had acted improperly and unethically throughout plaintiff's association as a counselor with defendant's family.

Defendant proceeded to file multiple complaints with appropriate agencies and boards, alleging counseling misconduct on plaintiff's part. The only complaint at issue at trial and on appeal concerns one made to the National Board for Certified Counselors, Inc. (NBCC).[2] Specifically, plaintiff's defamation cause of action was predicated solely on the language

[1] The FIA found insufficient evidence of physical abuse.

[2] The statute of limitations for defamation barred consideration of other documents and complaints filed by defendant. No appellate issue is raised regarding the statute of limitations.

contained in a March 5, 1999, letter to the NBCC's ethics officer, Douglas E. Guilbert, Ph.D. The trial court ruled prior to trial that defendant may be protected by a qualified privilege depending on whether she published the letter with actual malice.

Plaintiff first argues that the jury's finding that defendant published statements in the letter without actual malice was against the great weight of the evidence. Plaintiff's argument lacks merit.

This Court reviews the trial court's ruling on a motion for new trial for an abuse of discretion. *Morinelli v Provident Life & Accident Ins Co,* 242 Mich App 255, 261; 617 NW2d 777 (2000). An abuse of discretion occurs when the decision was so violative of fact and logic that it evidenced a perversity of will, a defiance of judgment, or an exercise of passion or bias. *Bean v Directions Unlimited, Inc,* 462 Mich 24, 34-35; 609 NW2d 567 (2000). A grant of a new trial because the verdict was against the great weight of the evidence should only occur when the verdict was manifestly against the clear weight of the evidence, and the jury's verdict should not be set aside if there was competent evidence to support it; the trial court cannot substitute its judgment for that of the factfinder. *Ellsworth v Hotel Corp of America,* 236 Mich App 185, 194; 600 NW2d 129 (1999). Where there is conflicting evidence, the question of credibility of the witnesses should be left to the jury. *Rossien v Berry,* 305 Mich 693, 701; 9 NW2d 895 (1943).

This argument can be disposed of rather quickly because of the nature of the argument and the context in which the jury was instructed. Plaintiff makes the assumption that the statement in the letter the jury found to be false concerned defendant's claim that plaintiff never met her before testifying against her at the divorce trial. The verdict form and accompanying instructions were open-ended; there were eleven or more possible statements the jury could have found to be false and the verdict form did not ask the jurors to specify what statements in the letter they found to be false.

The verdict form provided in relevant part:

> We, the Jury, make the following findings of fact.
>
> 1. Did the Defendant's March 5, 1999 letter contain one or more statements that were false in some material respect which had a tendency to harm the Plaintiff's business reputation or deter others from associating with her professionally?
>
> Answer Yes or No.
>
> If your answer is No, do not answer any further questions.
>
> 2. At the time Defendant wrote the March 5, 1999 letter did she have knowledge that one or more of the statements were false or act with reckless disregard as to whether the statement(s) was/were true or false?
>
> Answer Yes or No.

Plaintiff did not challenge the jury instructions. Running with her assumption that the statement the jury found to be false concerned whether the parties met pre-divorce trial, plaintiff argues that the jury's finding that there was no actual malice associated with that statement was against the great weight of the evidence. This argument is not subject to proper review. This Court cannot determine that the finding of a lack of malice was against the great weight of the evidence because we simply do not know what statement the jury found to be false. Therefore, we cannot rule that the trial court abused its discretion in denying plaintiff's motion for new trial. It is possible, amongst a flurry of possibilities, that the jury found the false statement to be the one accusing plaintiff of negatively influencing defendant's daughter but yet concluding that it was a statement not made in bad faith.

Plaintiff does not address each and every statement separately and make an argument, as to each, that assuming this was the statement the jury found to be false, here are the reasons that the jury's finding of no malice was against the great weight of the evidence. We are not required to go through each statement ourselves and make plaintiff's arguments for her. As our Supreme Court stated in *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959):

> "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow."

The trial court did not err in denying plaintiff's motion for new trial.

Plaintiff next argues that the trial court erred in ruling that a qualified privilege existed with respect to defendant's communication to the NBCC predicated on plaintiff being a "limited-purpose public figure" and on defendant and the NBCC having a "shared interest." We disagree.

In order to establish a claim of defamation, a plaintiff must show: (1) a false or defamatory statement concerning the plaintiff; (2) an unprivileged publication to a third party; (3) fault amounting to at least negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm for defamation per se, or the existence of special harm caused by publication for defamation per quod. *Kefgen v Davidson*, 241 Mich App 611, 617; 617 NW2d 351 (2000).

In *Prysak v R L Polk Co*, 193 Mich App 1, 14-15; 483 NW2d 629 (1992), this Court, addressing the issue of a qualified privilege in a defamation action, stated:

> The determination whether a privilege exists is one of law for the court. The elements of a qualified privilege are (1) good faith, (2) an interest to be upheld, (3) a statement limited in its scope to this purpose, (4) a proper occasion, and (5) publication in a proper manner and to proper parties only. A plaintiff may overcome a qualified privilege only by showing that the statement was made with actual malice, i.e., with knowledge of its falsity or reckless disregard of its truth. [Citations omitted.]

Because this issue concerns one of law, this Court reviews the trial court's decision de novo. *In re RFF,* 242 Mich App 188, 198; 617 NW2d 745 (2000). Defendant, proceeding under MCR 2.116(C)(7) and (8), argued, in part, that her communication to the NBCC was protected by an absolute privilege; therefore, summary disposition was appropriate on the defamation claim. The trial court rejected the argument that an absolute privilege existed; however, the court ruled that a qualified privilege might protect defendant unless it could be established at trial that defendant acted with actual malice.

The defense of privilege exists as a matter of public policy, in that some communications are so necessary that, even if defamatory, they should be made. *Postill v Booth Newspapers, Inc,* 118 Mich App 608, 619; 325 NW2d 511 (1982). "Privileged communications may be either absolutely privileged or qualifiedly privileged." *Id.* at 619-620. Where an absolute privilege exists, there can be no action for defamation. *Couch v Schultz,* 193 Mich App 292, 294; 483 NW2d 684 (1992). The doctrine of absolute privilege is narrow and applies only to matters of public concern. *Froling v Carpenter,* 203 Mich App 368, 371; 512 NW2d 6 (1994). Absolute privilege extends to (1) proceedings of legislative bodies, (2) judicial proceedings, and (3) communications by military and naval officers. *Id.* Judicial proceedings can include a hearing before a tribunal or administrative board that performs a judicial function. *Couch, supra* at 294.

We agree with the trial court that an absolute privilege does not apply here; the communication by defendant to the NBCC was not made within what could reasonably be deemed as legislative or judicial proceedings or hearings.

In *New Franklin Enterprises v Sabo,* 192 Mich App 219, 222; 480 NW2d 326 (1991), this Court, addressing qualified immunity predicated on the subject of the publication being a limited-purpose public figure, stated:

> Publishers of statements concerning public figures are clothed with a qualified immunity that can be overcome only by a showing of actual malice. A private person can become a limited-purpose public figure when he voluntarily injects himself or is drawn into a particular controversy and assumes a special prominence in the resolution of that public controversy. However, a private person is not automatically transformed into a limited-purpose public figure merely by becoming involved in or associated with a matter that attracts public attention. The court must look to the nature and extent of the individual's participation in the controversy. [Citations omitted.]

We disagree with the trial court that plaintiff became a limited-purpose public figure by injecting herself in the divorce action.[3] A divorce action generally does not attract public attention, nor does it concern a public controversy. Here, defendant's divorce was not a newsworthy prominent event even within the county in which it occurred. The trial court's reliance on *Townshend v Hazelworth,* 875 F Supp 1293, 1300 (ED Mich, 1995), was misplaced because there the plaintiff voluntarily testified in a well-publicized murder trial that drew much

[3] The trial court mistakenly stated that plaintiff was a limited-purpose public official; the correct terminology is limited-purpose public figure.

media and the attention of the press. There is no indication here that defendant's divorce trial drew any media attention.

In *Rosenboom v Vanek*, 182 Mich App 113, 117; 451 NW2d 520 (1989), this Court, addressing the "shared interest" basis for a qualified privilege, stated:

> Michigan law recognizes a qualified privilege as applying to communications on matters of "shared interest" between parties. In *Harrison v Arrow Metal Products, Corp*, [20 Mich App 590, 611-612; 174 NW2d 875 (1969)], we defined the "shared interest" privilege and held that it extends to all bona fide communications concerning any subject matter in which a party has an interest or a duty owed to a person sharing a corresponding interest or duty. The privilege embraces not only legal duties but also moral and social obligations.

A case that we find to be very analogous to the present action is *Nuyen v Slater*, 372 Mich 654, 655; 127 NW2d 369 (1964), in which the plaintiff nurse filed a defamation action against the defendant alleging that she had been defamed in a letter written by the defendant to the state health department accusing the plaintiff of improper conduct. Our Supreme Court, utilizing the "shared interest"[4] doctrine and quoting *Bufalino v Maxon Bros, Inc*, 368 Mich 140, 153; 117 NW2d 150 (1962),[5] stated:

> "'A publication is conditionally or qualifiedly privileged where circumstances exist, or are reasonably believed by the defendant to exist, which cast on him the duty of making a communication to a certain other person to whom he makes such communication in the performance of such duty, or where the person is so situated that it becomes right in the interests of society that he should tell third persons certain facts, which he in good faith proceeds to do.'" [*Nuyen, supra* at 659.]

The *Nuyen* Court concluded:

> The letter written by defendant to the State health department in Lansing clearly falls within the scope of a qualified privilege as enunciated in the above quotation. As a private citizen interested in the proper administration of the local county health department, defendant was qualifiedly privileged to express her concern regarding the alleged improper conduct of an employee of the county health department and the office charged with supervisory powers over plaintiff. [*Id.* at 659-660.][6]

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[4] The Court did not directly reference the words "shared interest;" however, the Court's discussion clearly encompassed the principles of the doctrine.

[5] *Bufalino* was quoting 33 Am Jur, Libel & Slander, § 126, pp 124-126.

[6] In *Lawrence v Fox*, 357 Mich 134, 139; 97 NW2d 719 (1959), the Michigan Supreme Court stated that "[c]onsiderations of social policy similar in principle [to absolute privilege], but of lesser intensity, result in a privilege not absolute but conditional, or, as sometimes put, qualified, or defeasible." There are occasions in which a person has limited immunity to publish words,

(continued…)

In yet another case applying the "shared interest" doctrine, this Court in *Swenson-Davis v Martel*, 135 Mich App 632, 634-635; 354 NW2d 288 (1984), addressed a situation where the defendant wrote a letter to his child's school principal expressing dissatisfaction with his son's teacher, the plaintiff. The *Swenson-Davis* panel, ruling that a qualified privilege existed, stated:

> In general, a qualified privilege extends to all communications made bona fide upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, to a person having a corresponding interest or duty, and embraces cases where the duty is not a legal one but is of a moral or social character of imperfect obligation. *Timmis v Bennett*, 352 Mich 355, 366; 89 NW2d 748 (1958). . . .
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> The Michigan Supreme Court has held that a citizen who complains to the appropriate official about the fitness of a public school teacher enjoys a qualified privilege. *Wieman v Mabee*, 45 Mich 484, 486; 8 NW 71 (1881). Defendant [parent] had both an interest and a right to see that his child was being competently taught. His letter and the complained-of statements reflect defendant's legitimate concern with his child's education and fall within the scope of Michigan's qualified privilege. [*Swenson-Davis*, *supra* at 636-637 (footnote omitted).]

In order for us to properly address whether the "shared interest" doctrine of qualified privilege exists, it is necessary to examine the nature of the NBCC. Dr. Guilbert, as the ethics officer for the NBCC, handled defendant's complaint. Guilbert testified, through a deposition *de bene esse*, that the NBCC is a credentialing organization that offers voluntarily sought certifications to counselors who meet the requisite requirements. The requirements are a master's degree in counseling or related field, several years of counseling, and the passing of an examination. For members, there is a continuing education requirement, and counselors agree to abide by a code of ethics. Counselors have an obligation to disclose any actions that could violate the code of ethics.

With respect to whether members are complying with the code of ethics, Guilbert testified that the NBCC relies on self-disclosure by members, and the NBCC relies on clients of member counselors to submit complaints of unethical behavior. After a legitimate complaint is filed, the NBCC conducts an investigation, which includes the right of the counselor to respond in writing to the allegations and a hearing if desired. Violation of the code of ethics, depending on the type of violation, can lead to various sanctions or actions by the NBCC, including counselor training, supervised instruction, private reprimand, censure, public reprimand, and certification probation. Guilbert testified that the purpose of the NBCC was to assure the public

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(…continued)

such as where a publication is fairly made by a person in the discharge of some public or private duty, legal or moral, or in the conduct of his own affairs, in matters where his or her interest is concerned. *Id.* See also *Gaynes v Allen*, 128 Mich App 42; 339 NW2d 678 (1983), where this Court ruled that an ophthalmologist organization had a qualified privilege to publish an article concerning an optometrist's incompetence in light of the societal importance in publishing such information.

that if they visit a counselor certified by the NBCC, they would be counseling with a professional who abided by a strict and formal standard of practice or code of ethics. The code of ethics for the NBCC indicates that the organization promotes quality assurance in counseling practice, the value of counseling, public awareness of quality counseling practice, professionalism in counseling, and leadership in credentialing.

We conclude that the trial court did not err in applying a qualified privilege based on the "shared interest" of defendant and the NBCC in the communication at issue. The evidence indicates that the NBCC serves an important societal purpose, i.e., protecting the public by measuring the professional competence and knowledge of member counselors and holding members to a strict code of ethics. The NBCC protects the public from unethical counseling practices by allowing affected clients or patients to report possible ethical violations, which in turn can result in the sanctioning of a counselor. Plaintiff enjoyed the benefit of her NBCC certification through use and display of the certification for the purpose of drawing clients to her practice. Defendant clearly had an interest, and a right under NBCC rules, in pursuing the complaint against plaintiff for perceived wrongs committed against her based on plaintiff's counseling. Defendant, and society at large, has an interest in the proper exercise of a counselor's duties, especially where the counselor's actions impact such important issues as child custody and abuse. The NBCC clearly had an interest in receiving information about a counselor whom they had certified and indicated to the public was an individual who abided by the NBCC's code of ethics. Aside from any internal policies of the NBCC, the NBCC had a moral and social obligation to hear complaints about a member counselor that could impact the lives of others, and defendant had a similar corresponding obligation in revealing possible improper conduct to the NBCC in order to protect others from the same conduct. Additionally, defendant filed her complaint in a proper forum. The trial court committed no error.[7]

Plaintiff next argues that the trial court erred in granting defendant's motion for summary disposition on her claim of intentional infliction of emotional distress (IIED) pursuant to MCR 2.116(C)(8). We disagree.

MCR 2.116(C)(8) provides for summary disposition where "[t]he opposing party has failed to state a claim on which relief can be granted." A motion for summary disposition under

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[7] Plaintiff also argues that the trial court erred in applying the "shared interest" doctrine as a matter of law, where defendant's motion was brought pursuant to MCR 2.116(C)(8), and where there was an issue of fact as to whether defendant's communication was "bona fide" as required for the doctrine to be applicable. This argument lacks merit. The trial court merely determined that an absolute privilege did not apply and that, if there was any privilege protecting defendant, it would be qualified under, in part, the "shared interest" doctrine. The trial court ruled that it could not grant summary disposition to defendant on the basis of qualified immunity-shared interest because there was an issue of fact whether defendant's communication was made in good faith, or in other words "bona fide." The jury determined that there was no bad faith on defendant's part, and thus, the jury necessarily decided that defendant's communication was "bona fide" and protected by a qualified privilege. The *Nuyen* Court stated that there is a presumption of good faith and proper motive, and that the jury must determine the issue of good faith where the evidence is contradictory. *Nuyen, supra* at 660. The jury did just that in the case at bar.

MCR 2.116(C)(8) tests the legal sufficiency of a complaint. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). The trial court may only consider the pleadings in rendering its decision. *Id.* All factual allegations in the pleadings must be accepted as true. *Dolan v Continental Airlines/Continental Express,* 454 Mich 373, 380-381; 563 NW2d 23 (1997).

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Koenig v City of South Haven,* 460 Mich 667, 674; 597 NW2d 99 (1999). The elements of a claim of IIED are: (1) extreme and outrageous conduct; (2) intent or recklessness; (3) causation; and (4) severe emotional distress. *Duran v The Detroit News, Inc,* 200 Mich App 622, 629-630; 504 NW2d 715 (1993). Liability for IIED is found only where the conduct complained of has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. *Johnson v Wayne Co,* 213 Mich App 143, 161; 540 NW2d 66 (1995). The trial court initially makes the determination whether conduct is so extreme as to permit a cause of action for IIED; however, where reasonable minds could differ, the jury is to decide the issue. *Doe v Mills,* 212 Mich App 73, 92; 536 NW2d 824 (1995).

The trial court ruled that the allegations were not sufficiently extreme and outrageous to support a claim for IIED. Essentially, this case involves numerous complaints filed with relevant licensing and certification agencies or boards by a person who felt aggrieved by the actions of a social worker, which actions were related to the exercise of social worker functions. Accepting the allegations in the complaint as true, this is not a case involving extreme and outrageous conduct going beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community.

Plaintiff relies on *Haverbush v Powelson,* 217 Mich App 228; 551 NW2d 206 (1996); however, the case is abundantly distinguishable to the situation here. In *Haverbush, id.* at 234, this Court held that a rational trier of fact could have found the defendant's actions sufficient to support a claim for IIED, where the defendant Powelson:

> (1) sent a barrage of letters to Haverbush, to his daughter, and to his future in-laws, in which she called him a compulsive liar, threatened his fiancée with physical harm, and threatened to tell his colleagues that he had harassed Powelson; (2) left lingerie on Haverbush's vehicles and at his residence several times; (3) left an ax and a hatchet on his vehicles, after having asked him how his fiancée would like to have an ax through her windshield; (4) told a co-worker several times that someone should "ice" Haverbush; and (5) wrote several letters threatening to move in with him even though he was engaged and would soon be married.

The trial court here did not err in granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(8) with respect to the IIED claim.

Finally, plaintiff asserts that the trial court erred in awarding defendant attorney fees incurred in the action, where plaintiff rejected an offer to stipulate to entry of judgment under MCR 2.405. We disagree.

Defendant made an offer to stipulate to entry of judgment pursuant to MCR 2.405 in the amount of $1,000 shortly after this litigation commenced, and the offer was rejected. Following the trial, the court awarded defendant slightly over $40,000 in costs incurred in the action of which approximately $39,000 constituted attorney fees.

MCR 2.405(D) provides, in pertinent part:

> (1) If the adjusted verdict is more favorable to the offeror than the average offer, the offeree must pay to the offeror the offeror's actual costs incurred in the prosecution or defense of the action.
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> * * *
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> (3) The court shall determine the actual costs incurred. The court may, in the interest of justice, refuse to award an attorney fee under this rule.

This Court reviews a trial court's decision to award costs under MCR 2.405 for an abuse of discretion. *J C Building Corp II v Parkhurst Homes, Inc*, 217 Mich App 421, 426; 552 NW2d 466 (1996). The reasonable refusal of an offer, without more, is insufficient to justify the denial of attorney fees pursuant to MCR 2.405. *Luidens v 63rd Dist Court*, 219 Mich App 24, 33; 555 NW2d 709 (1996). In *Butzer v Camelot Hall Convalescent Centre, Inc (After Remand)*, 201 Mich App 275, 278-279; 505 NW2d 862 (1993), this Court, discussing the parameters of MCR 2.405, stated:

> The fact that plaintiff may have proceeded to trial in good faith does not excuse liability for fees when she knowingly denied the offer at the risk of having to pay those fees. The better position is that a grant of fees under MCR 2.405 should be the rule rather than the exception. To conclude otherwise would be to expand the "interest of justice" exception to the point where it would render the rule ineffective. [Citations omitted.]

In *Reitmeyer v Schultz Equip & Parts Co, Inc*, 237 Mich App 332, 338; 602 NW2d 596 (1999), this Court noted that the purpose of MCR 2.405 is to encourage settlement and to deter protracted litigation, and the "interest of justice" exception is implicated only in unusual circumstances.

In *Stitt v Holland Abundant Life Fellowship (On Remand)*, 243 Mich App 461, 471-472; 624 NW2d 427 (2000), a case relied on by plaintiff, this Court found that the trial court abused its discretion in awarding attorney fees under MCR 2.405, where the defendant made an offer of judgment of $25,000 and the jury returned a no cause of action, finding that the defendant did not breach its duty of care. The *Stitt* panel found that "unusual circumstances" existed because there was a change or clarification in the case law occurring during the extensive proceedings, making the nature of the law unsettled. *Id.* at 473. Additionally, the panel found "unusual circumstances" because gamesmanship was involved and there was a change in the offer of judgment rule. *Id.* at 473-474. The *Stitt* panel concluded that the defendant engaged in gamesmanship because the $25,000 offer was made after a unanimous $160,000 mediation evaluation and because the medical expenses alone incurred by the decedent was $67,000. *Id.* at

474-476. The court rule change no longer allowed consideration of an offer made after a unanimous mediation evaluation. *Id.* at 476; MCR 2.405(E).

Here, the law was only somewhat unsettled with respect to privilege under the specific circumstances presented; however, as noted above, the application of a qualified privilege under these circumstances was proper and its application was reasonably foreseeable in light of significant analogous case law. There was no change in law that occurred during proceedings. Moreover, the $1,000 offer did not constitute "gamesmanship," where, in light of plaintiff's subsequent settlement offers, it was clear that dollar amounts were not of overriding concern. Significant savings would have been realized had plaintiff accepted the offer.

Even if we assume plaintiff's rejection of the offer was in good faith and reasonable, the case law makes clear that these considerations do not constitute "unusual circumstances" giving rise to the application of the "interest of justice" exception. We find that the trial court provided strong support for the conclusion that the "interest of justice" exception should not be applied. Minimally, there was no abuse of discretion. Plaintiff sought an apology and/or a retraction, and defendant refused to do so; the jury's verdict indicated a lack of malice, making it questionable whether plaintiff was entitled to any apology or retraction. There were no "unusual circumstances" requiring the trial court to invoke the "interest of justice" exception to MCR 2.405; thus, the trial court did not abuse its discretion in awarding defendant attorney fee sanctions.

Affirmed.

/s/ William B. Murphy
/s/ Donald S. Owens
/s/ Bill Schuette